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No. 96-704

In The

Supreme Court of the United States

October Term, 1996

Edward H. Patterson and Barbara Morley, Husband and Wife and American Central City, Inc., a Nebraska Corporation,
Petitioners,

v.

City of Lincoln, Nebraska, a Municipal Corporation,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Nebraska

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

Whether a jury verdict within the range of evidence should be upheld.

Whether the weight and credibility of the testimony of lay and expert witnesses upon issues of valuation and damages are peculiarly of a local nature and ordinarily to be determined by the jury.

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STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The question of the Fifth and Fourteenth Amendments to the United States Constitution were never presented or argued to the Nebraska courts.

STATEMENT OF THE CASE

This case involves land that was condemned in connection with a redevelopment project which had the multiple goals of establishing a boundary for the University of Nebraska, developing a park, and reintroducing residential property into the neighborhood. The Petitioners' appraisers placed the value of the taking at $872,000.00, while the property owners' opinion of value was $2,180,000.00. The Respondent's first appraiser placed the taking at $381,500.00, while a second appraiser for the Respondent placed the value at $325,000.00. The jury returned a verdict of $424,270.00. In their assignment of errors to the Nebraska Supreme Court, the Petitioners alleged:

> (1) That the verdict of jury is contrary to law and not supported by the evidence in that the jury failed to find that the fair market value of the land taken by condemnation at time of taking was not in excess of $424,270.00 (four hundred twenty-four thousand two hundred seventy dollars).
>
> (2) That the Court erred by not allowing Appellant to present expert testimony and evidence as to the fair market value of the subject property as of the date of taking, based upon an income and development cost approach to valuation.
>
> (3) That the Court erred by allowing testimony, duly objected to by the Appellant, insofar as the

> expert testimony of the Defendant's witnesses, Frank Frost and Matthew J. Wilson, regarding evidence of fair market value of the subject property as of the date of taking, in the testimony of said expert witness was not the proper measures of damages.

Patterson v. City of Lincoln, 550 N.W.2d 650, 653 (Neb. 1996).

Pursuant to United States Supreme Court Rule 15.1, the Respondent brings the following misstatements of facts contained in the Appendix to the Court's attention. The Petitioners in what has been labeled Appendix B, attempt a post-trial analysis of two exhibits marked "E22" and "E39" which set out the comparable sales used by the Respondent's experts. This "analysis" contains facts that were never proven or introduced at trial and distorts other facts. For example, on page 24 of the Appendix, the Petitioners state no "comparable" listed is adjusted for location. The Petitioners conveniently ignore that the comparables used by the City came from the immediate neighborhood of the Petitioners, including some of the property condemned by the Respondent, and no adjustment was necessary. By and large, Appendix B misrepresents to this Court the facts proven at trial.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE PETITIONERS' ARGUMENTS.

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 403 U.S. 419, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court

will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court).

It should be pointed out that the Nebraska Constitution at Art. I, § 21 provides "the property of no person shall be taken or damaged for public use without just compensation therefor." At no time in any pleading in this case have the Petitioners cited the Fifth or Fourteenth Amendment of the United States Constitution.

It is well settled in this Court that it must be made to appear that some provision of the federal, as distinguished from the state, constitution was relied upon and that such provision must be set forth. *New York Central & H.R. Co. v. New York*, 186 U.S. 269, 273 (1902).

Numerous cases have held that the Court has no jurisdiction to exercise its appellate jurisdiction over state court judgments under § 1257 unless a federal question has been both raised and decided in the state court. As Justice Story stated in *Crowell v. Randell*, 10 Pet. 368, 391 (1836), "[i]f both of these [the raising and the deciding] do not appear on the record, the appellate jurisdiction fails." The rule of *Randell* has evolved into the axiom that a federal claim cannot be considered by the Court unless it has either been raised in the state court or considered and resolved by the state court. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Hill v. California*, 401 U.S. 797, 805 (1971). This Court has stated many times that when

> [t]he highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state

> court, unless the aggrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969).

In summary, this case is unlike *Washington v. Chrisman*, 455 U.S. 1, 5 n. 2 (1982) where repeated references in the state court opinion "to the Fourth Amendment and our cases construing it" made it clear that the decision did not rest on an independent state ground. *See also Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) (where a "fair reading of the opinion below convinces us" that the state court "rested its decision solely on federal law").

SUBSTANTIAL FEDERAL QUESTION

The jurisdictional requirements formalized in § 1257 require the raising of a substantial federal question. The rule requires that for the purposes of certiorari, the validity of a federal right must be "drawn in question" and "specially set up or claimed."

This case is a "garden variety" condemnation. It is a typical conflict of opposing expert witnesses in a condemnation case regarding value. In the final analysis, it is clear that the jury found the opinion of damages offered by the City more credible than that of the Appellants and within the range of evidence.

In *State Dep't of Roads v. Dillon*, 175 Neb. 444, 122 N.W.2d 223 (1963), the Nebraska Supreme Court described the identical issue before this Court as follows:

> [1] [T]he sole matter before us at this time is an evaluation of the weight and credibility of the testimony to determine whether the amount of the

> verdict and the judgment of the trial court were purely and excessively wrong under applicable rules of law.

Id. at 446, 122 N.W.2d at 225.

In the present matter, the jury verdict fell in between the conflicting expert testimony presented by the Petitioners and Respondent. As noted by the Nebraska Supreme Court in *Iske v. Metropolitan Utilities Dist. of Omaha*, 183 Neb. 34, 157 N.W.2d 887 (1968), this situation is a frequent one in condemnation cases. And in such a situation, the Court in *Iske* held that:

> The weight and the credibility of the testimony of either lay or expert witnesses is for the jury. Expert opinion evidence, widely varying in this case, is to be considered and weighed by the triers of fact like any other testimony. The expert witnesses' testimony is purely advisory and is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting the verdict of the jury will not be set aside unless it is clearly wrong.

Id. at 49, 157 N.W.2d at 897. *See also Jensen v. State Dep't of Roads*, 184 Neb. 802, 172 N.W.2d 607 (1969).

Here, the jury was presented with a range of evidence valuing damages to the subject property. The jury returned an award of $424,270.00 which was within the range of the testimony and which was consistent with the City's opinion as the fair market value of the property. This verdict should be

sustained as being within the range of testimony. *Zwygart v. State of Neb. Dep't of Roads*, 230 Neb. 128, 430 N.W.2d 301 (1988).

II.

THE DECISION OF THE NEBRASKA SUPREME COURT EXCLUDING HYPOTHETICAL INCOME IS CONSISTENT WITH THE GENERAL RULE.

An attempt to value unimproved land by capitalizing hypothetical income from an imaginary apartment complex has such speculative probative value that it was properly excluded under Nebraska law. It should be noted that comparable sales were available, the Petitioners introduced ten alone.

Nebraska is not unique in excluding the "capitalization of hypothetical income" method of valuation in eminent domain proceedings. As it states in 4 *Nichols on Eminent Domain*, § 12B.09[3] (3d ed. rev. 1994), "the capitalization of hypothetical income method of valuation has generally been rejected by the courts."

A leading case in this area out of New York is *Levitin v. State of New York*, 12 A.D.2d 6, 207 N.Y.S.2d 798 (N.Y. App. Div. 1069), *reargument denied, Levitin v. State of New York*, 13 A.D.2d 611, 214 N.Y.S.2d 712 (N.Y. App. Div. 1961). In *Levitin*, the Court found reversible error in a trial court's allowance of testimony from a condemnee's experts who calculated the value of the condemned property by capitalizing the income from a nonexistent motel which would contain 129 units. The Court held:

> Such a method of valuation of vacant, unimproved land is completely unprecedented. There is no

> authority cited by claimants in support of it and none is to be found, for how can income be capitalized to produce a residual land value when the appropriated land is neither producing income nor equipped to produce such income? . . . *a claim is improper where it is based entirely on hypothetical profits estimated from a nonexistent business* (*New York Central Railroad Co. v. Maloney*, 234 N.Y. 208, 137 N.E. 305; *Niagra, Lockport & O.P. Co. v. Horton*, 231 A.D. 402, 247 N.Y.S. 761). (Emphasis added.)

4 *Nichols on Eminent Domain*, § 12B.09[3] (3d ed. rev. 1994). The *Levitin* Court recognized that the valuation of property through capitalization of hypothetical income is too speculative to be admissible.

In a case from Connecticut, *Tandet v. Urban Redevelopment Commission, Etc.*, 179 Conn. 293, 426 A.2d 280 (1979), the Connecticut Supreme Court reversed a state referee's award to a condemnee which was based on the capitalization of hypothetical income from an office building not yet built on the condemned property. The Connecticut Supreme Court stated:

> Although we are mindful of the sophisticated appraisal methods utilized in the profession and the quantum of statistical forecast data available, we are also mindful of the inherent unreliability of many such distant projections, which must, of necessity, take into consideration numerous factors and variables, known and unknown, that influence investment decisions.

Id. at 284. The Court concluded that the "[e]vidence of the distant cost of the conversion of the profits to be derived

therefrom. . .would be speculative and, therefore, inadmissible." *Id.* at 285.

Likewise, in *State by Comm'r of Transp. v. Mehlman*, 118 N.J. Super. 587, 289 A.2d 539 (App. Div. 1972), a New Jersey Superior Court reversed a trial court's decision which admitted opinion testimony of the value of condemned property based on capitalization of hypothetical income from a nonexistent building. That court held:

> To permit jury to do so, would be placing our stamp of approval on [the witness's] projection of a hypothetical building on vacant land, and capitalizing hypothetical income anticipated to be derived therefrom, without considering the multitude of unknown variables in erecting, leasing, operating, and financing the project. Such an approach is improper.

Id. at 541.

In *U.S. v. 1.16 Acres, etc., City of Stamford, Conn.*, 300 F.Supp. 1021 (D. Conn. 1969), a U.S. district court in Connecticut clearly described why the capitalization of hypothetical income is not a sufficiently reliable form of valuation to introduce at trial. The court stated:

> A fundamental problem encountered in the use of the "cost-income" approach in the case of an apartment still in the planning stage is that a relatively slight error in prognostication with respect to the estimated cost, income, or operating expenses of the prospective enterprise results in a disproportionately large variation in the ultimate residual land value. By way of example in the present case . . . an increase of about 25% in construction costs . . . would have reduced the residual land values arrived at by these experts by

> approximately 70% and 62% respectively. Furthermore. . .a decrease in rental income of $1,000 would result in a corresponding decrease in land value of over $15,000. . . .

Id. at 1024. This example illustrates why the capitalization of hypothetical income is too speculative to be admitted at trial. A slight miscalculation or inaccurate assumption can cause a large variation in the ultimate valuation. This problem is exacerbated by the fact that the numerous variables that must be included in the calculations are almost impossible to predict with a high degree of accuracy.

In the case at bar, the hypothetical valuation evidence sought to be introduced by Petitioners' experts was far too speculative to be admitted at trial. There is no way to determine with any precision the cost of building such a complex, labor or weather delays, whether financing could be obtained, whether a building permit could be obtained, whether future tenants would pay the rental rates to be charged, etc., etc., etc. Any error made in estimating such variables would have a large impact on the final valuation. Therefore, the Nebraska district court properly excluded Petitioners' proffered valuation testimony based on the capitalization of hypothetical income because such testimony would be far too speculative.

CONCLUSION

> Just compensation must give a party a full and perfect equivalent in money. The condemnee ought to be placed in as good financial position as he would have occupied had the property not been taken.

Mononagahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). Clearly this was done in this case.

Respectfully submitted,

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